SOCHIMA OKOYE

v.

PUBLIC PROSECUTOR

COURT OF APPEAL, KUALA LUMPUR
DATUK SHAIK DAUD BIN HAJI MOHD. ISMAIL JCA
TUAN GOPAL SRI RAM JCA
DATO' V.C. GEORGE JCA
[CRIMINAL APPEAL NO. R-05-1-94]
17 FEBRUARY 1995

DANGEROUS DRUGS: *Trafficking in heroin - Dangerous Drugs Act 1952 - Defence case - Allegation that real trafficker was another person - Judge did not disbelieve defence story but found the accused guilty after finding presumption under s. 37(d) to have arisen - Whether finding of guilt proper - Whether Judge duty bound to consider further whether reasonable doubt arose on the presumption of trafficking under s. 37(da) - Failure to consider s. 37(da) as a separate exercise - Whether fatal - Dangerous Drugs Act 1952 ss. 37(d), 37(da), 39A(2), 39B(1)(a).*

This was an appeal by the appellant against his conviction and sentence in respect of an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 for trafficking in 2840.3 grams of heroin, for which he was sentenced to death. The proscribed drugs were recovered by the Customs from inside three bags purportedly belonging to the appellant on board a train at Padang Besar, Perlis.

At the trial below the appellant had put up a defence that the real trafficker was his friend by the name of James Smith, who, according to the appellant, was the real owner of the bags, and therefore, must have been the one who had put the drugs into those bags. In his judgment the trial Judge had assessed the appellant's story about the existence of James Smith, and concluded that *"Up to this point, there was nothing inherently incredible about the defence's story"*. The learned Judge, however, found that the appellant had failed to rebut the presumption of possession and knowledge under s. 37(d) and on that ground held the appellant guilty as charged.

Before the appeal Judges the appellant's Counsel argued, on the authority of *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 CLJ 2073, that while a person may be in possession of a dangerous drug, he is entitled to an acquittal on a charge of trafficking if it could be demonstrated, either on a balance of probabilities or by raising a reasonable doubt, that there is another person who is the real trafficker. In the event Counsel argued that the course as adopted by the trial Judge herein was flawed as the Judge, having made the finding that the appellant's story in respect of James Smith not being incredible, ought to have further considered, as a matter of a separate and distinct exercise, whether the presumption of trafficking under s. 37(da) of the Act had been rebutted.

The issue that arose was whether on the facts, and notwithstanding that the Court had found that the presumption under s. 37(d) of the Act had not been rebutted, it was still incumbent for the Court to consider whether, on a balance of probability, the defence has rebutted the statutory presumption of trafficking under s. 37(da).

Held:

Per Gopal Sri Ram JCA (delivering the judgment of the Court):

[1] The correct principle to apply is that unless the evidence does not obviously so warrant, it is incumbent for the Court to consider whether on the balance of probability the defence has rebutted the statutory presumption of trafficking under s. 37(da) as a separate exercise even though the Court is satisfied that the presumption of possession under s. 37(d) has not been rebutted. The failure to do so is a material misdirection and would be fatal to the conviction.

[2] The learned Judge, having found the appellant's story about the existence of James Smith to be true, ought to have addressed his judicial mind to the further question as to whether there was any reasonable doubt raised that Smith was the real trafficker. The failure by the learned Judge to administer unto himself *"the Radhi direction"* renders his ultimate conclusion fatally flawed.

[Appeal allowed. Conviction and death sentence set aside. Accused instead convicted under s. 39A(2) and sentenced to life imprisonment and 12 strokes of whipping]

[**Bahasa Malaysia** Translation of Headnotes]

DADAH BERBAHAYA: *Mengedar heroin - Akta Dadah Berbahaya 1952 - Kes pembelaan - Pengataan bahwa pengedar sebenar adalah seorang yang lain - Hakim tidak menolak cerita pembelaan tetapi mendapati tertuduh bersalah selepas memutuskan bahawa anggapan di bawah s. 37(d) telah berbangkit - Samada keputusan bersalah teratur - Samada Hakim berkewajipan membuat pertimbangan lanjut samada wujud keraguan munasabah terhadap anggapan mengedar di bawah s. 37(da) - Kegagalan mempertimbang s. 37(da) sebagai satu pertimbangan yang berasingan - Samada fatal - Akta Dadah Berbahaya 1952 ss. 37(d), 37(da), 39A(2), 39B(1)(a).*

Ini adalah rayuan oleh perayu terhadap sabitan dan hukuman berhubung kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 kerana mengedar 2840.3 gram heroin di mana dia telah dihukum mati. Dadah terlarang tersebut telah dijumpai oleh pihak Kastam dari dalam tiga beg yang kelihatannya dimiliki oleh perayu di atas sebuah keretapi di Padang Besar, Perlis.

Di perbicaraan di bawah perayu telah membangkitkan pembelaan bahawa pengedar sebenar ialah kawannya yang bernama James Smith yang, menurut perayu, adalah pemilik sebenar beg-beg berkenaan, dan oleh itu, adalah orang yang meletakkan dadah tersebut di dalam beg-beg itu. Cerita perayu tentang kewujudan James Smith ini telah dinilai oleh Hakim perbicaraan dalam penghakimannya, di mana beliau memutuskan *"up to this point there was nothing inherently incredible about the defence's story"*. Yang arif Hakim, bagaimanapun, mendapati bahawa perayu gagal mematahkan anggapan pemilikan dan pengetahuan di bawah s. 37(d) Akta dan atas alasan itu mendapati perayu bersalah seperti dituduhkan.

Di hadapan Hakim-Hakim rayuan Peguam perayu berhujah, berdasarkan autoriti kes *Mohamad Radhi bin Yaakob v Public Prosecutor [1991] 3 CLJ 2073*, bahawa, sementara seseorang itu boleh dikatakan memiliki dadah berbahaya, dia berhak untuk dibebaskan dari tuduhan mengedar jika ianya boleh dibuktikan, samada atas imbangan kebarangkalian atau pun dengan menunjukkan keraguan yang munasabah, bahawa terdapat seorang lain yang menjadi pengedar sebenar. Oleh hal yang demikian, Peguam menghujahkan bahawa cara yang dipakai oleh Hakim perbicaraan di sini adalah silap oleh kerana Hakim tersebut, setelah memutuskan bahawa cerita perayu tentang James Smith bukanlah sesuatu yang mustahil, sepatutnya membuat pertimbangan lanjut, sebagai satu pertimbangan yang berasingan, samada anggapan mengedar di bawah s. 37(da) telah dapat dipatahkan.

Isu yang timbul ialah samada berdasarkan fakta, dan walaupun Mahkamah telah memutuskan bahawa anggapan di bawah s. 37(d) Akta telah tidak dipatahkan, Mahkamah masih berkewajipan menimbang samada, atas imbangan kebarangkalian, pihak pembelaan telah mematahkan anggapan di bawah s. 37(da).

Diputuskan:

Oleh Gopal Sri Ram HMR (menyampaikan penghakiman Mahkamah):

[1] Prinsip yang betul dan terpakai ialah, kecuali keterangan dengan sangat jelasnya tidak mengizinkan, ianya menjadi kewajipan Mahkamah menimbang, di atas imbangan kebarangkalian, samada pembelaan telah mematahkan anggapan mengedar statutori di bawah s. 37(da) sebagai satu pertimbangan yang berasingan, walaupun Mahkamah telah berpuashati bahawa anggapan pemilikan di bawah s. 37(d) telah tidak dipatahkan. Kegagalan berbuat demikian adalah satu salah-arahan yang material dan adalah fatal kepada sabitan.

[2] Hakim yang bijaksana, setelah mendapati cerita perayu tentang kewujudan James Smith sebagai sesuatu yang benar, harus menumpukan perhatian kehakimannya kepada soalan lanjut samada keraguan yang munasabah telah dibangkitkan bahawa James Smith adalah pengedar yang sebenarnya. Kegagalan yang arif Hakim menggunapakai *"arahan Radhi"* menjadikan keputusan terakhirnya satu kesilapan yang memudaratkan.

[Rayuan dibenarkan. Sabitan dan hukuman mati diketepikan. Tertuduh sebaliknya disabitkan dibawah s. 39A(2) dan dihukum penjara seumur hidup dengan 12 sebatan]

Cases referred to:
Mohamad Radhi bin Yaakob v. PP [1991] 3 CLJ 2073 ***(foll)***
Rameshwar v. State of Rajasthan AIR 1952 SC 54 ***(foll)***
Tan Yook Suan v. R [1954] MLJ 116 ***(foll)***
Gooi Loo Seng v. PP [1993] 2 MLJ 137 ***(foll)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 7(d), 37(da) 37(d), 39A(2), 39B

For the appellant - Karpal Singh (Manjit Singh & T. Gunaseelan with him); M/s. Manjit Singh & Co.
For the public prosecutor - S.C. Augustin, DPP

JUDGMENT

Gopal Sri Ram JCA:

This appeal was heard on 7 February 1995. At the conclusion of argument we allowed the appeal, quashed the conviction under s. 39B of the Dangerous Drugs Act, 1952 (the Act) and set aside the sentence of death passed by the High Court. In its stead, we entered a conviction under s. 39A(2) of the Act and, after considering the plea in mitigation advanced by Encik Karpal Singh, of Counsel for the appellant, imposed a sentence of life imprisonment and 12 strokes of the rottan. We also ordered that the sentence of imprisonment do run from the date of the appellant's arrest. The reasons for our decision are now handed down.

The appellant was charged, as has been said, for an offence under s. 39B of the Act. That charge reads as follows:

> Bahawa kamu Sochima Okoye, pasport Nigeria No. A390813 pada 30 November 1990 kira-kira pukul 11.30 pagi di pejabat Kastam dan Eksais Diraja Malaysia, Bahagian Hasil, Stesyen Keretapi, Padang Besar di dalam Daerah Titi Tinggi dalam Negeri Perlis Indera Kayangan, telah mengedar dadah berbahaya iaitu 2840.3 gram heroin bagi pihak diri kamu sendiri dan dengan itu kamu telah melakukan satu kesalahan di bawah s. 39B(l)(a) Akta Dadah Berbahaya 1952 (Semakan 1980) dan boleh dihukum dibawah s. 39B(2) Akta yang sama.

The facts of the case as produced by the prosecution in the Court below are as follows. On 30 November 1990 PW2 and PW4 , both officers of His Majesty's Customs, boarded the southbound train at Padang Besar. They were accompanied by three other Customs officers. Their task was to conduct a routine search for dutiable goods that may be carried on board by the passengers. In one of the compartments, PW2 and PW4 noticed three bags on a rack provided for that purpose. These were located above seat no. 37 which was vacant at the time. They were the only luggage on that rack. PW3 and PW4 inquired about the ownership of the bags. As a result of information they obtained, PW4 called out to the appellant, who was standing in the queue at the Immigration counter, to come into the compartment in question. The appellant did so. PW4 asked the appellant a number of questions. In response, the appellant answered that he was a Nigerian National travelling from Bangkok to Singapore. PW4 then asked of the appellant: "Where are your bags?" The appellant responded by pointing to the three bags atop the luggage rack above seat no. 37. PW4 requested the appellant to bring down the bags and to open each of them. In one of the bags was a cardboard box marked 'Rice Cooker'. It is an item that attracts duty. So, PW2 instructed PW4 to have the three bags removed to the Customs office at the station for the purpose of ascertaining if there were any other dutiable goods carried by the appellant. The appellant was asked to accompany PW4. This is what is commonly known as a "100% check". It was, as has been earlier said, a purely routine matter. PW2 also instructed PW4 to collect from the appellant the security deposit that His Majesty's Customs normally collects from transit passengers to ensure that dutiable goods are re-exported from Malaysia.

The appellant carried the three bags to the customs office and placed them on a counter. In the presence of PW2 and PW4 the appellant opened one of the bags. In it was a rice cooker (Ex. P4). PW3, another customs officer who was also present at the office, examined Ex. P5. He tried depressing the "on/off" button but it appeared to be jammed. So he produced a metallic wire and probed the area where the switch was located. When he withdrew the wire he found traces of a whitish powder on it. He was about to undertake a closer examination of the rice cooker when the appellant took flight. A careful search lasting several hours found him hiding in the belukar. He was then taken into formal custody and charged with the extremely serious offence of trafficking in an illicit drug.

Meanwhile, PW5, an officer from the Prevention Branch who had been sent for by PW3 conducted a careful examination of the appellant's luggage. He found two other rice cookers (Exhibit P1O and P15). Concealed in each of them were several plastic packets containing what he justifiably believed to be a dangerous drug. PWI, a chemist attached to the Chemistry Department at Pulau Pinang to whom the substance recovered was sent, positively ascertained that it was heroin as listed in the First Schedule of the Act. The total quantity recovered amounted to 2840.3 grams.

The appellant's trial before Mohd. Saari Yusoff J was held on 17 October 1992. In the course of its case the prosecution unsuccessfully attempted to adduce four inculpatory statements made by the appellant, the Judge, rightly holding that this evidence was inadmissible. At the conclusion of the prosecution's case, on 14 January 1993, the learned Judge acquitted and discharged the appellant without calling upon him to enter his defence to the charge. The public prosecutor then appealed to the Supreme Court which, on 15 November 1993, not surprisingly allowed the appeal and remitted the case back to the learned Judge with a direction that the appellant do enter upon his defence. We say "not surprisingly" because, in his written reasons for acquitting the appellant the learned Judge overlooked evidence showing that the appellant was in possession of the proscribed drug. We refer, of course, to the uncontradicted evidence of PW2 and PW4 that the appellant indicated his ownership of the bag containing the heroin by pointing to it while aboard the train.

The trial of the appellant resumed on 25 February 1994. The appellant elected to give evidence on oath. The gist of his story was that he was befriended in Lagos by an American named James Smith to whom he expressed a desire to emigrate to the United States. Smith is supposed to have told the appellant that a visit to a third country was necessary before one could apply for entry into the United States. Smith then purchased an airline ticket for the appellant to travel to Singapore. The appellant, when he checked-in at Lagos airport, was issued and was in possession of a boarding pass for Singapore. Unfortunately, this aspect of the case was not pursued by the learned Deputy who conducted the prosecution in the Court below (not Encik Stanley Augustine who responded to the appeal before us) during the cross-examination of the appellant. One is left to wonder why the appellant, who, while being in possession of a valid ticket with Singapore marked as the destination, undertook the rather longer and more arduous train journey. It is also a matter that attracted the learned Judge's attention as it finds mention in his grounds of judgment. But the learned Judge, in the absence of cross-examination upon the subject, was obviously at a disadvantage and quite properly said no more about it.

Returning to the facts, it is common ground that the appellant broke his journey at Bangkok. According to him, the suggestion of a stop over at Bangkok came from Smith while they were in the air en route to Bangkok. The appellant testified that in Bangkok Smith handed him two bags containing kitchen utensils to be carried to Singapore. The suggestion that the appellant travel to Singapore by train, the appellant said, came from Smith. The rest of his evidence concerned his journey to Padang Besar and the events there. With regard to his fleeing from the Customs Office at the railway station, this is the explanation he gave:

> When I heard them (meaning PW2 and PW4) saying "heroin or morphine", I was so surprised and shocked as to how the substance came to be in the rice cooker. It crossed my mind then may be James concealed the substance there. That may be the reason why James wanted me to travel ahead of him to Singapore. I felt so angry and cheated. I moved two or three steps away from the officials. I mumbled angrily to myself in Nigerian language saying "What have I done to this man that he wants to put me in this trouble". I was very angry with James. When I looked round the whole office, I noticed that I was the only civilian in the office. Then, I became afraid of the whole situation because all the officials were staring at me. My fear doubled when I recalled about the death penalty written on the disembarkation card which I read shortly before reaching Padang Besar. I was so afraid because I thought the officials were going to kill me instantly. I jumped over the counter and fled.

The learned Judge, after hearing the appellant's evidence and the submissions made by Counsel and the learned Deputy convicted the appellant on the charge and imposed the mandatory sentence of death by hanging.

Now, reading the record and without the benefit of oral testimony, we found the appellant's story about James Smith to be quite incredible. That such a man as James Smith ever existed, to our mind seemed more consistent with fiction than fact. Nevertheless, sitting as a Court of Appeal, we are, save in very exceptional cases (and we hasten to add that this is not one such case) bound by the facts as found by a trial Judge. This is especially so where the finding of fact rests upon a substratum of oral evidence, the credibility of which is entirely for the Judge to decide. Had one of us been the trial Judge, we may well have equated belief in the existence of James Smith with that of Peter Pan. But that is irrelevant. What is relevant is what the trial Judge in this case found. And this is what he said:

> The issue then is whether T (accused) had knowledge of the impugned drugs inside the rice cookers.

> In his testimony, T stated that he worked as a mill supervisor with a monthly salary of about US20. About three months prior to the alleged offence, T came to know one American businessman, named James Smith who promised to help T in getting a visa to United States.
>
> **Up to this point, there was nothing inherently incredible about the defence's story**. (Emphasis supplied).

In our view, the learned Judge began by asking himself the right question, namely, as to the state of mind of the appellant at the material time. If the appellant knew not that there were concealed in the rice cookers drugs proscribed by the Act, then, although he may have been in possession of them, he may not, according to the law as we understand it, be a trafficker of them. This is in fact the burden of Encik Karpal Singh's argument to which we shall turn shortly. In the determination of the issue relating to the appellant's state of mind the additional question requiring an answer is whether James Smith ever existed. The sentence in the judgment of the learned Judge to which we have supplied emphasis reveals the approach taken by the Judge upon that question. We are bound by the finding made by him that there is nothing incredible about so much of the appellant's evidence as relates to the existence of James Smith and about the way in which he befriended the appellant.

Encik Karpal Singh submits that once that finding was made, the learned Judge was under the further duty to consider, as a separate and distinct exercise as to whether the presumption under s. 37(da) (quite apart from the presumption created by s. 37(d)) of the Act had been rebutted. That subsection, in so far as is relevant to this case, reads as follows:

> 37 In all proceedings under this Act or any regulation made thereunder:
>
> (d) any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug;
>
> (da) any person who is found in possession of:
>
> (i) 15 grammes or more in weight of heroin,
>
> ...
>
> otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug.

The essence of Counsel's argument is, as we earlier observed, that in law while one person may be in possession of a dangerous drug, he would be entitled to an acquittal on a charge of trafficking by demonstrating either on a balance of probabilities or by raising a reasonable doubt that there is another who is the real trafficker. In support of his submission, Encik Karpal Singh cited the decision of the Supreme Court in *Mohamad Radhi bin Yaakob v. PP* [1991] 3 CLJ 2073.

In *Radhi*, the facts were these. Four police officers while on a crime prevention patrol encountered the accused Radhi and one Hashim. Slung across the shoulders of the accused was a bag. When confronted by the officers, Hashim fled and, despite a diligent search, was never found. Radhi threw the bag he carried into a padi field and fled as well, but was apprehended. The bag when recovered was found to contain more than 500 grammes of cannabis. The accused was charged and convicted for trafficking. He appealed.

The Supreme Court held that in the state of the evidence the trial Judge in that case was correct in finding that a *prima facie* case had been made out and therefore in calling for the

defence. The following is a summary of the evidence led by the accused which we have extracted from the judgment of the Supreme Court delivered by Mohd. Azmi, SCJ, now FCJ:

> The appellant gave evidence on oath and called eight other witnesses to prove firstly that Hashim was the owner of the bag containing the cannabis and that he was merely an innocent and momentary carrier of the bag, and secondly, it was Hashim and not he who was trafficking in the cannabis. The appellant's father (DW4) and mother (DW5), gave evidence to corroborate his story that Hashim was in their house that night watching TV until 11.00 p.m. when he and the appellant left the house to buy cigarettes. On arrival near the shop, the appellant went to purchase cigarettes whilst Hashim approached a group of three persons - DW6, DW7 and DW8 who were then sitting under a tree. When the appellant came out of the shop, he approached the three persons, one of whom was his own brother (DW7) and was informed that Hashim had gone away for a while on a motorcycle borrowed from one of them. So the appellant waited there for Hashim to return and had a chat with the three persons. After about one and half hours Hashim returned and was seen carrying a bag. The appellant and Hashim then walked back to the house of appellant's parents. On the way Hashim wanted to urinate and asked appellant to hold the bag for him momentarily. It was soon after this that police appeared on their motorcycles. He saw Hashim running away and he himself felt frightened and threw the bag away, but denied attempting to run away. After his arrest the appellant took the police to his parents' house where the police made a search and recovered clothing belonging to Hashim.
>
> The shopkeeper Mustaffa bin Yusof (DW3), confirmed that the appellant did come and buy some cigarettes from his shop that night. ASP Mohd. Hanafiah bin Ismail (DW2) of the Anti Narcotic Special Branch also testified of the abortive police attempts to trace the whereabouts of Hashim. There was however no dispute that at the time of the appellant's arrest, he was in the company of Hashim. **In short Hashim was not a fictitious person.**
>
> The last defence witness was Norazam bin Mohamed (DW9). He testified that he was arrested the same night for possession of cannabis which he had purchased from Hashim. Fifty rolls of cannabis were sold to him on 11 July 1986 at about 5.00 p.m. The notes of evidence showed that in the course of cross-examination, the Deputy Public Prosecutor had referred him to his previous statement to the Police, but nothing further was done to impeach his credit, **with the result that his evidence remained admissible for consideration by the Court on the issue of who was actually trafficking in cannabis on the night of 12 July 1986.** The fact that Hashim was trafficking in drugs when he sold cannabis to Norazam was not seriously challenged; nor the fact of Norazam's arrest for possession of cannabis. There was therefore nothing inherently improbable that several hours later, Hashim continued to be trafficking in cannabis in that kampung when found in the company of the appellant.
>
> (Emphasis added).

What comes through crystal clear from the lucidity of the language used, and particularly from those parts of the judgment upon which we have placed emphasis, is that there was sufficient evidence led to establish the fact that Hashim was the trafficker. The trial Judge had, in respect of this evidence, said:

> The Court has taken time to consider very carefully all the evidence in its entirety. The onus on the defence is to rebut the statutory presumptions on the balance of probability, especially the presumption under s. 37(d) the presumption of possession and knowledge of the nature of the drug. Defence need not rebut the trafficking presumption of s. 37(da) if defence has succeeded in rebutting the presumption of 37(d). The defence can also raise reasonable doubt where possible in the prosecution's case to be entitled to an acquittal.
>
> Was accused telling the truth? Were the three people (DW6, DW7 and DW8) sitting under the ketapang tree telling the truth? It is purely a question for the Court to evaluate the evidence and make a finding on who are telling the truth and who are not telling the truth.

The Supreme Court reacted to the aforesaid direction by the trial Judge in the following words:

> In this connection, Counsel for the appellant had referred us to the case of *Public Prosecutor v. Saimin & Ors.* [1971] 2 MLJ 16 where Sharma J held that the falsity of the defence does not relieve the prosecution from proving the prosecution case beyond reasonable doubt. We are of the view that whenever a criminal case is decided on the basis of the truth of the prosecution case as against the falsity of the defence story, a trial Judge must in accordance with the principle laid down in *Mat v. Public Prosecutor* [1963] MLJ 263 go one step further before convicting the accused by giving due consideration as to why the defence story though could not be believed did not raise a reasonable doubt on the prosecution case. Thus, even though a Judge does not accept or believe the accused's explanation, the accused must not be convicted until the Court is satisfied for sufficient reason that explanation does not cast a reasonable doubt on the prosecution case. To satisfy this test it is not so much the words used by the Judge, but rather the actual application of the test to the facts of the case that matters. In this case, we found the learned trial Judge offered practically no reason why the defence notwithstanding its falsity and unconvincing nature, had failed to cast reasonable doubt on the prosecution case, other than to state by way of lip service the duty placed by the law on the defence to earn an acquittal.
>
> It is a well established principle of Malaysian criminal law that the general burden of proof lies throughout the trial on the prosecution to prove beyond reasonable doubt the guilt of the accused for the offence with which he is charged. There is no similar burden placed on the accused to prove his innocence. He is presumed innocent until proven guilty. To earn an acquittal, his duty is merely to cast a reasonable doubt on the prosecution case. In the course of the prosecution case, the prosecution may of course rely on available statutory presumptions to prove one or more of the essential ingredients of the charge. When that occurs, the particular burden of proof as opposed to the general burden, shifts to the defence to rebut such presumptions on the balance of probabilities which from the defence point of view is heavier than the burden of casting a reasonable doubt, but it is certainly lighter than the burden of the prosecution to prove beyond reasonable doubt. To earn an acquittal at the close of the case for the prosecution under s. 173(f) or s. 180 of the Criminal Procedure Code, the Court must be satisfied that no case against the accused has been made out which if unrebutted would warrant his conviction (*Munusamy v. PP* [1987] 1 MLJ 492).
>
> It is a finding of fact that the defence has not rebutted the statutory presumption of s. 37(d) on the balance of probability at all **and it follows that presumption of s. 37(da) is also not rebutted.** Nor has the defence raised any reasonable doubt in the prosecution case. And it is a finding of fact that the prosecution's case against the accused has been proved beyond any reasonable doubt.
>
> (Emphasis supplied)

Whilst we could not disagree with what the learned Judge had said earlier in his judgment that if the defence had succeeded in rebutting the presumption of possession under s. 37(d), there was no need to rebut the presumption of trafficking under s. 37(da), it did not follow that the presumption of trafficking would become irrebuttable merely because the defence had failed to rebut the presumption of possession. **In our opinion unless the evidence in a particular case does not obviously so warrant, it is incumbent for the Court to consider whether on a balance of probability in the evidence the defence has rebutted the statutory presumption of trafficking under s. 37(da) as a separate exercise even though the Court is satisfied on balance that the presumption of possession under s. 37(d) has not been rebutted. In this case, the failure to do so was a material misdirection and was fatal to the conviction.**

On the issue of trafficking, we found the learned Judge had failed sufficiently to consider the evidence of defence witnesses, particularly that of DW9 which clearly indicated that on the night in question Hashim was in all probabilities the trafficker of the cannabis. In our

view, the learned Judge had acted on the wrong premise that once the appellant had failed to rebut the presumption under s. 37(d), the presumption under s. 37(da) became irrebuttable so as to relieve the Court from the duty to consider separately on a balance whether the presumption under s. 37(da) had been rebutted. In our view, on the facts of this particular case, this error of law had occasioned a miscarriage of justice.

(The emphasis is mine)

One who reads the judgment in *Radhi* will find that we have virtually reproduced the whole of it here. We have done so because the principle to be gathered from the words of Mohd. Azmi SCJ, has been stated in such simple and exact terms that any attempt at paraphrasing it may, we fear, denude it of its valuable content and suffer loss by transposition into less adequate language.

The learned Judge in the present case addressed the rebuttal of the presumption in the following rather cursory terms:

> Having considered the evidences (*sic*) in totality together with the demeanour of T (accused) in Court, and after hearing the arguments of the learned defence Counsel and DPP, I am satisfied that the case against T had been proved beyond reasonable doubt and that the defence had failed to rebut the statutory presumptions on the balance of probability as propounded in *PP v. Yuvaraj* [1969] MLJ 59. Further, I find that defence had failed to raise any reasonable doubt as to the guilt of T.

We agree with Encik Karpal Singh that the judgment when, read as a whole reveals no separate exercise as that postulated by the decision in *Radhi*. We also agree with his submission that the use of the plural expression "presumptions" by the learned Judge in the passage we have reproduced a moment ago does not amount to a sufficient compliance of what we will call "the *Radhi* direction".

The learned Judge, having found the appellant's story about the existence of James Smith to be true, ought to have addressed his judicial mind to the further question as to whether there was any reasonable doubt raised that Smith was the real trafficker. Had he done so he may well have held that he was not, in which event our task would have been made that much easier. Unfortunately he did not and it is our view that the failure by the learned Judge to administer into himself the *Radhi* direction renders his ultimate conclusion fatally flawed.

In our judgment, the failure of a Judge to properly direct himself or in misdirecting himself is to be treated on the same footing as a non-direction or a misdirection by a Judge to a jury. *Rameshwar v. State of Rajasthan* AIR 1952 SC 54, *Tan Yook Suan v. R* [1954] MLJ 116 and *Gooi Loo Seng v. PP* [1993] 2 MLJ 137 are decisions that are authority for this proposition. And in the last mentioned case Edgar Joseph Jr. SCJ (now FCJ) stated the principle in the following words:

Clearly, therefore, the trial Judge, was bound to, but did not view the whole of the evidence objectively and from all angles, with the result that the appellant had lost the chance which was fairly open to him of being acquitted. On this point, we consider that non-direction, amounts to a misdirection, for in the words of *Pickford J* in *R v. Bundy* ...the trial was not satisfactory, and the case was not put to the jury in a way to ensure their due appreciation of the value of the evidence.

We must treat the failure of a trial Judge sitting alone, to direct himself correctly in the same way a failure to direct a jury correctly. In these circumstances, a miscarriage of justice may well have occurred.

Before us, the learned Deputy fairly, and quite properly, conceded that the learned Judge was duty bound, in the light of his earlier finding, to administer unto himself the *Radhi* direction. In these circumstances, we had no alternative but to intervene and make the orders we have set out in the opening paragraph of this judgment.

There was a further submission made by Encik Karpal Singh relating to the learned Judge's adverse comment upon the appellant's flight from the customs office. The complaint here is that the learned Judge had, when acquitting the appellant at the end of the prosecution's case attached no weight to this fact, but when considering the defence had attached significance to it. By reason of the conclusions arrived at in respect of Counsel's primary argument, it is unnecessary for us to make any comment on this submission, particularly when we invited the learned Deputy to refrain from making any response to it.

On the question of sentence, we took into account everything advanced by Encik Karpal Singh in mitigation, the learned Deputy leaving the matter in our hands. Considering all the circumstances of the case and the quantity of the drug involved, we imposed the punishment adverted to earlier in this judgment.

Before we conclude we think that it is necessary to say something about the conduct of the customs officers involved in the detection of the crime and in the apprehension of the appellant. Too often is there a tendency to overlook the extremely valuable contribution made by the officers of the several law enforcement agencies in the detection of crime and in the bringing of criminals to justice. We therefore take this opportunity to commend each of the customs officers involved in this case for their efforts in this case. But for their timely action, a substantial amount of a dangerous drug would have found its way into the hands of those who peddle death.